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IN THE

Supreme Court of the United States

October Term, 1974

No. A-641-(74-944)

TIME, INC.,

Petitioner,

versus

MARY ALICE FIRESTONE,

Respondent.

RESPONDENTS' JURISDICTIONAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Howell, Kirby, Montgomery,
D'Aiuto and Dean
P. O. Drawer 3626
West Palm Beach, Florida 33402
Attorneys for Respondent

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OPINIONS AND ORDERS BELOW

This case has had numerous appeals. On November 15, 1968, the trial court rendered a summary judgment in Time, Inc.'s favor (Petitioner's Appendix D). That order was appealed and reversed (Petitioner's Appendix E). The cause then went back to trial and a jury verdict was entered on September 9, 1970, in favor of Mrs. Firestone and against Time, Inc. in the amount of $100,000 (Petitioner's Appendix F). Time, Inc. then appealed to the Fourth District Court of Appeal raising six points on appeal, one of which was whether Time, Inc. was liable under *New York Times v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct.710, since Mrs. Firestone's divorce was, so argued Time, Inc., a matter of public interest. The Fourth District stated that it found merit to each point, to various degrees, but only discussed reversal under the New York Times doctrine. The Court held that under that doctrine

the divorce of Mrs. Firestone was an event of public interest as a matter of law, and that as a matter of law and fact Time, Inc. was not guilty of malice or reckless disregard in publishing the article labeling Mrs. Firestone an adulteress. The Court then reversed the verdict and judgment in favor of Mrs. Firestone and entered judgment in favor of Time, Inc. (Petitioner's Appendix G). Mrs. Firestone then petitioned the Florida Supreme Court for certiorari and that court quashed the Fourth District's decision holding that the Firestone divorce was not a matter of great public interest and therefore the New York Times doctrine did not protect Time, Inc. The Florida Supreme Court remanded the cause back to the fourth District for consideration of the other five points that had been originally raised by Time, Inc. in that court (Petitioner's Appendix A).

It should be noted that if Time, Inc. wanted review of that decision, which made the ruling on the New York Times doctrine, it would have had to appeal it at that time. It makes no difference that the Florida Supreme Court, after quashal of the Fourth District's decision, remanded the cause for consideration of the "other issues presented". The issue presented as to the New York Times doctrine was very clearly finally decided by that decision, and Time, Inc. chose not to appeal it. Time, Inc. clearly can not now contend that that opinion, which was rendered over two years ago, on December 20, 1972, can now be reviewed by this Court. Time, Inc. made a decision at that time not to appeal the opinion and must now live with that decision.

After the Florida Supreme Court remanded the case to the Fourth District Court of Appeal for consideration of of the other issues that had been raised by Time, Inc.,

the Fourth District merely rendered a decision finding "reversible error as to all of the other points presented" (Petitioner's Appendix B). Mrs. Firestone again petitioned the Florida Supreme Court, which again issued an opinion on December 11, 1974, quashing the Fourth District's decision and ordering reinstatement of the jury verdict and final judgment in favor of Mrs. Firestone (Petitioner's Appendix C). That is the only decision that is rightly before this court for consideration as to jurisdiction.

JURISDICTION

This court lacks jurisdiction under 28 USC §1257 to review the Florida Supreme Court's decision rendered in 1972, since that decision finally settled and disposed of the issue as to whether Mrs. Firestone's marriage was a matter of great public interest and should have been appealed at that time. That adjudication was not subject to further review by a state court. Once the mandate was issued after the first appeal to the Florida Supreme Court, on the subsequent appeal nothing was brought up but the proceeding subsequent to the mandate. *Illinois v. Illinois Central R Co.* (1902) 22 S.Ct. 300, 184 U.S. 77.

In *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.* (1973) 94 S.Ct. 407, 414 U.S. 156 this Court reviewed a judgment of the North Dakota Supreme Court, under which the case had been remanded so that further state proceedings could be conducted respecting Snyder's application for a permit to operate a drug store. This court held that judgment to be a final judgment and ripe for review.

In *Miami Herald Publishing Co. v. Tornillo* (1974) 94 S.Ct. 2831, it was held that the Florida Supreme Court's

judgment upholding the constitutionality of a certain statute and remanding the matter for further proceedings was final and ripe for review by this Court.

Reece v. State of Georgia (1955) 76 S.Ct. 167, cited by Time Inc., is clearly distinguishable. There the defendant was convicted and sentenced. He appealed and one of his points on appeal was systematic exclusion of Negroes from the jury. The Georgia Supreme Court found against Reece on that point, but reversed the case on another ground and remanded it for a new trial. The defendant was retired and again found guilty. He then appealed through the state courts and his conviction was upheld. On appeal to this Court, it was held that Reece could raise the question in regard to systematic exclusion of Negroes.

It is evident that the *Reece* holding is correct because Reece appealed to this Court the question as to systematic exclusion of Negroes at the first opportunity he had to do so. Even though the Georgia Supreme Court had ruled against him on that point in the first appeal, it had nonetheless reversed for a new trial. Hence, clearly Reece would not have been expected to appeal to this Court at that time. Unlike in the Reece case, in the present case, Time, Inc. did not appeal to this Court, at the first opportunity for doing so, the issue as to whether Mrs. Firestone's divorce was a matter of public interest. Rather, since Time, Inc. *lost* the first appeal, rather than won as Reece did, Time, Inc. had the opportunity to appeal the decision to this Court at that time, and decided not to do so. Hence, that decision can not be reviewed at this time.

QUESTIONS PRESENTED

1. Was the Supreme Court of Florida in error under the First Amendment because it imposed liability without fault wtih respect to a routine news item reporting a judicial decision accurately, carefully and competently?

2. Was petitioner's news item a rational interpretation of an ambiguous judicial opinion and thus entitled to First Amendment protection so that failure of the Supreme Court of Florida to affirm dismissal of the action was error?

3. Was the Supreme Court of Florida in error because of its failure (a) to impose an "actual malice" standard of proof under the First Amendment upon a plaintiff who had instituted and been drawn into a particular public controversy which commanded a substantial amount of independent public interest and who brought suit with respect to a routine news item reporting accurately, carefully and competently a judicial decision that was given nationwide coverage because of the prominence of the parties involved in that particular public controversy, and (b) under that standard to affirm dismissal of the action?

4. Did respondent's explicit withdrawal of any claim for damage to reputation arising from a routine news item reporting a judicial decision make mandatory imposition of an "actual malice" standard of proof under the First Amendment so that the failure of the Supreme Court of Florida to impose that standard and affirm dismissal of the action was error?

STATEMENT OF THE CASE AND FACTS

On December 15, 1967, Russell A. Firestone, Jr., was granted a divorce from Mary Alice Firestone. Mrs. Firestone had originally sought separate maintenance, but her husband counterclaimed "for divorce on grounds of ex-

treme cruelty and adultery." In awarding the divorce to Russell Firestone, the divorce decree stated:

> ". . . It is the conclusion and the finding of the Court that neither party is domesticated. . . In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved. . . ."

The divorce decree also awarded alimony in the sum of $3,000.00 per month to Mrs. Firestone, plus custody of their minor child, and $740.00 per month child support (Pltf's Exhibit 2).

Defendant Time, Inc., the publisher of the magazine "Time," printed on December 22, 1967, under the heading "Milestones", the following article:

> "Divorced. By Russell A. Firestone, Jr., 41 heir to the tire fortune; Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach school teacher; *on grounds of extreme cruelty and adultery;* after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extra-marital adventures on both sides, said the judge, to 'make Dr. Freud's hair curl'." (emphasis added) (Pltf's Exhibit page 77).

Thereafter on January 19, 1968, Mrs. Firestone, through her attorney, demanded in writing a retraction of said article (T92-94; Pltf's exhibit A & B). Since Mrs. Firestone had been awarded alimony, she had not been found guilty of, nor had the divorce been granted on, the ground of adultery (as stated in Time's article), for under the laws of Florida a wife found guilty of adultry could not

be awarded alimony. §61.08 F.S. Notwithstanding, Time, Inc. declined to retract the article.

Mrs. Firestone then filed a libel suit against Time, Inc., which defended asserting, among other things, the absence of actual malice. This cause came on for trial on July 13, 1970. The jury returned a verdict for Mrs. Firestone and against Time, Inc. in the amount of $100,000.00, and a Final Judgment was entered pursuant to the jury verdict on September 9, 1970 (R462). The various appeals discussed, *supra*, followed.

The facts in this case clearly support the jury verdict. Bill Doerner, who had been with Time Magazine approximately six months at the time this article was written, came into the office of Miss Ursula Nadasdy, a legal researcher for Time magazine, and showed to her an Associated Press wire pertaining to the Firestone divorce. The AP dispatch merely stated that Mrs. Firestone was "accused of" adultry (T345,207; Def's Exhibit 1). Miss Nadasdy immediately called the "library" to obtain all folders pertaining to the Firestones (T208-9). She promptly sent a query to Time, Inc's. Miami bureau (T209-10; Pltf's Exhibit 6) specifically asking them to report "the grounds on which it (the divorce) was granted *in the words of the Judge*" (T185-6,202). She explained that the legal grounds for the divorce were necessary and that Time, Inc. would not just take the word of the Associated Press or any other source. It was up to their correspondents to get the exact grounds (T201-2).

Miss Nadasdy did, in fact, receive precisely what she requested (Plf's Exhibit 4). In quotation marks, the correspondents for Time, Inc., told the New York office the grounds for the divorce *in the words of the Judge:*

> "The judge, however, in quite a colorful opinion, said that 'neither of them had shown the least susceptibility to domestication and that the marriage should be dissolved'." (T189).

The communications between Time's New York office and their Miami branch were rather fast and furious. Because this was a Saturday and the deadline for the publication of this magazine usually was 8:00 p.m., everyone was working against this deadline (T191).

In addition to the AP dispatch and the dispatch from Time, Inc's Miami Buerau, neither of which stated Mrs. Firestone had been found guilty of adultery, Miss Nadasdy obtained a clipping of a New York newspaper which likewise stated that Mrs. Firestone had been "accused" of adultery.

One of Time Inc's. "stringers", Bob Delaney, was asked to check out the divorce. Neither Delaney nor any other Time employee ever once looked at the court file or read the divorce decree (T262). However, based upon a telephone conversation with Mrs. Firestone's attorney in the divorce proceedings, Mr. Farish, Jr., Mr. Delaney advised Time, Inc. that the grounds for the marriage were extreme cruelty and adultery. Mr. Farish, Jr., completely denied that he had ever told Mr. Delaney that (R76-77). Farish, Jr., testified that Delaney had asked him what Mrs. Firestone was accused of, and Farish Jr., had stated that Mr. Firestone had accused her of extreme cruelty and adultery. However, he had pointed out to Delaney that the Court had granted the divorce on the ground of lack of domesticity. He advised Delaney that Mrs. Firestone had not been found guilty of adultery (T86-90).

Delaney had also contacted Judge Knott, the trial judge

who rendered the divorce decree. Judge Knott emphatically testified that he never told Delaney that Mrs. Firestone was found guilty of adultery (T447-8). On proffer, he also testified under oath that he did not in fact find Mrs. Firestone guilty of adultery in his order (T438).

Once all this information was obtained by Nadasdy, it was turned over Doerner, the writer. He wrote the first draft of the article, later to be submitted to Mr. George G. Daniels, the Senior Editor, for final approval (Pltf's Exhibit 9). Doerner admitted that both sources he used to write the first draft of the article mentioned that the presiding Judge doubted the testimony of extramarital affairs (T353). Doerner had included a statement to that effect in his draft of the article, because he felt that it was important and certainly should be included in the article (T353,355). However, in the final draft, the Senior Editor Daniels performed surgery on Doerner's work deleting that doubt (T354) by omitting that statement, and all other references to "accused", "counterclaimed", or "alleged". At trial Doerner admitted that there was nothing that he had before him, that stated that the lower court had ruled that Mrs. Firestone was guilty of adultery (T364). Notwithstanding, the final draft of the article (Pltf's Exhibit 10) stated that the divorce was granted on the grounds of extreme cruelty and adultery (T370), failed to mention a word about the Judge discounting much of the testimony as to extramarital activities and failed to mention anything about lack of domesticity, the ground given in the divorce decree as the ground for the divorce.

Finally, it was the duty of Miss Nadasdy to perform an accuracy check and to place over each word a line showing that it had, in fact, been checked and that it was accurate (T178). She failed to check and mark the word "adultery",

although the other words were so marked showing that they had been checked out and that they were accurate. Mr. Daniels, the Senior Editor, admitted that Time required each word to be so marked and that Ursula Nadasdy, the researcher, had failed to meet that requirement (T322). He also admitted that although he had "thought" someone had checked the circuit court file and read the divorce decree prior to publication (T262), no one had done so.

REASONS FOR DENYING THE WRIT

Time, Inc. initially argues that the Florida Supreme Court dislikes and distrusts the press. Certainly that is a gross and flagrant accusation, supported by nothing perhaps but a personal dislike or distrust of the Florida Supreme Court.

Time, Inc. then essentially sets forth five arguments why the writ should be granted.

1. As discussed *supra*, the Florida Supreme Court's decision that Mrs. Firestone's divorce was not a matter of public interest was rendered back in 1972. Time, Inc. did not appeal that decision at that time, and hence cannot now raise that issue in the appeal from a subsequent decision of the Florida Supreme Court rendered in a later appeal and which did not address itself to that issue.

There is an additional reason why Time, Inc.'s, argument must be rejected. Time, Inc. here argues that Mrs. Firestone was a public figure and that under *Butts* and other cases she had to show "actual malice" to recover for defamation. Time, Inc. then states that the Florida Supreme Court failed to address itself to whether Mrs.

Firestone was a *public figure* or not, but simply found that her divorce was not a matter of public interest or concern. However, Time, Inc. overlooks the fact that it never argued in the many briefs filed in the Florida appellate courts that Mrs. Firestone was a *public figure*. Although Time, Inc.'s point on appeal was expressed in terms of whether Mrs. Firestone's proof was sufficient under the New York Times doctrine, the only argument ever advanced in support thereof was that Mrs. Firestone's divorce was a matter of public interest.

Time, Inc. stated in its initial brief to the Fourth District Court of Appeal:

> "The New York Times decision involved, of course, only a "public official". However, both the Florida and Federal courts have now made it quite clear that the standards of that decision apply to any publication involving a matter of *public interest.*" (emphasis added)

Throughout that brief and all the following briefs filed by Time, Inc. and Mrs. Firestone, the argument was whether Mrs. Firestone's divorce was a matter of *public interest.* (Respondent's Appendix A and B). It was not ever, not once, contended by Time, Inc. that Mrs. Firestone was a public figure. Now Time, Inc. has evidently decided that the Florida Supreme Court correctly decided that her divorce was not a matter of great public interest, and now wishes to argue, for the first time, that she was a public figure instead. Certainly Time, Inc. cannot now raise this argument when it has never once done so throughout the appellate process in the Florida Courts. *F.T.C. v. Travelers Health Assn.* (U.S. 1960) 80 S.Ct.717, 362 US 293, *U.S. v. Spector* (Cal.1952) 72 S.Ct.59, 343 U.S.169.

Even if the point were arguable, Time, Inc. merely cites language from the Florida Supreme Court's opinion as support for the finding that Mrs. Firestone was a public figure. However, regardless of what the Florida Supreme Court said, that finding must be record supported. As stated by this Court in *Gertz v. Welch*, Case No. 72-617, June 25, 1974.

> "None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was a typical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent *clear evidence* of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (emphasis added)

The *clear evidence* required for proof that Mrs. Firestone was a public figure is completely lacking.

2. The Florida Supreme Court's decision is not incompatible with *Time, Inc. v. Pape* (1971) 91 S.Ct. 633,401 U.S.282. It should first be noted that that case is applicable only if it is found that the New York Times doctrine is applicable, only if it can be found that Mrs. Firestone was a public figure as argued by Time, Inc. However, as shown under subsection 1, *supra*, Time, Inc. cannot now raise the issue of whether Mrs. Firestone is a "public figure" for a variety of reasons. It therefore follows that *Pape* is completely inapplicable.

Moreover, the Pape decision is inapplicable because in the present case Time, Inc. did not secure a copy of the divorce decree, read it and then, based upon its interpretation of the divorce decree, report in the article that Mrs. Firestone was divorced for adultery. If Time, Inc. did not read and rely upon an interpretation of language in the divorce decree, which it now contends is ambiguous, how can this case fall under the Pape decision. *Pape* concerns rational interpretations of an ambiguous document. Here, Time, Inc. did not *read* or *rely* upon the divorce decree for its article. Hence, it cannot now be heard to argue backwards and rely upon any ambiguity it might "after the fact" find to exist in the divorce decree.

Furthermore, the Florida Supreme Court's decision is not incompatible with *Pape*, even if it were applicable. *Pape* concerned publication of an article by Time, Inc. summarizing a government report, issued by the United States Commission on Civil Rights, entitled "Justice" and relating to police brutality. "Justice" had referred to the case of *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473 solely by quoting the allegations set forth in Monroe's complaint against the Deputy Chief of Detectives, Pape. However, the Time article gave the following account of the Monroe incident:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says Justice, 'broke through two doors woke the Monroe couple with flash lights * * *.'"

The article went on to quote at length from the sum-

mary of the Monroe complaint, without indicating in any way that the charges were those made by the complaint rather than independent findings of the Commission which wrote the government report. Pape sued Time, Inc. based upon the above article. This Court held that Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of the Commission's report which bristled with ambiguities. Thus, as a matter of law it was found that there was no "actual malice" on Time's part.

The present case is clearly distinguishable from *Pape*. This court clearly pointed out in that case that *Pape* differed "in a number of respects from the conventional libel case". There, the publication sued on was not Time's independent report of the Monroe episode, but its report of what the Civil Rights Commission had said about the episode. Since the Commission's report was ambiguous and the conclusion drawn by Time was a rational interpretation of it, there was no malice. Unlike in that case, in the present case, we *are* concerned with Time's independent report of the divorce rather than a summary of what Judge Knott said in the divorce decree, or a summary of the terms of the divorce decree. If Time's article had purported to be either, then perhaps there might be room for error in interpretation. However, the article in question was Time, Inc.'s own independent report, based upon Time, Inc.'s own independent research and investigation, since it did not purport to be a summary of what Judge Knott said or did in the decree, but rather stated as *fact* that Russell Firestone had been granted a divorce from Mrs. Firestone on the grounds of adultery.

In order to rely upon *Pape*, Time, Inc. must have read and relied upon the divorce decree, which it now con-

tends is ambiguous. They did neither and therefore they can not possibly claim their article was the result of a rational interpretation of the divorce decree, which is what *Pape* is all about.

3. There was clearly no imposition of liability without fault by the Florida Supreme Court. Nor did the Florida Supreme Court find negligence based solely upon the basis that the article about Mrs. Firestone was in error, as Time, Inc. contends. Such gross generalizations completely ignore the evidence.

Time, Inc. argues that proper editorial procedure was used and that there was no evidence whatsoever of actual malice or negligence. However, none of the sources of information which came to Time, Inc. indicated Mrs. Firestone was found guilty of adultery, except the statement from their stringer Delaney. Did this raise serious doubt in Time, Inc.'s eyes as to its truth or falsity? Evidently so. After the article was written, Miss Nadasdy was to perform an accuracy check and place over each word a line showing that it had in fact been sufficiently checked (T178). Her failure to check and mark the word "adultery" is clearly evidence that there was serious doubt, at least in her mind, as to its accuracy or its truth or falsity. This certainly indicates serious doubt as to whether they had checked the statement out sufficiently to go ahead and publish it as being an accurate statement. That doubt, in and of itself, clearly indicates that Time, Inc., while doubting whether a statement that Mrs. Firestone was found guilty of "adultery" was accurate, was guilty of negligence and reckless disregard in going ahead and publishing nationwide an article labeling Mrs. Firestone an adulteress, just because it was expedient to do so in order to meet the deadline they were working against.

Time, Inc. argues that the documents relied upon by it gave the same picture that their article gave (ie.), that the divorce was granted for extreme cruelty and adultery. However, in those documents "accused of adultery" was the exact terminology used.

Time, Inc. also argues that if it had published the full text of the divorce decree, it would still be liable under the rationale of the Florida Supreme Court because the decree would have conveyed to the public exactly what their "Milestones" article did—that Mrs. Firestone had been divorced on grounds of extreme cruelty and adultery. This clearly overlooks the fact that the jury found exactly to the contrary, finding that the "Milestones" article had a different effect on the mind of the reader than the divorce decree. As stated by the Florida Supreme Court in its second opinion (Appendix C):

"We must also emphasize that the trial court specifically instructed the jury that,

> 'I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce judgment in the case of Firestone v. Firestone, Case No. 64 C 2790C. McCormick v. Miami Herald Publishing Co., 139 So.2d 197 (2nd DCA 1962).'

Therefore, to reach a verdict for petitioner, the jury must necessarily have determined that the article did have a different effect than the reading of the divorce judgment by the public. In McCormick v. Miami Herald Publishing Company, 139 So.2d 197 (Fla.App.2,1962), the court stated that a workable test is whether the libel as published would have a different effect on the mind

> of the reader from that which the pleaded truth would have produced. See also, Hammond v. The Times Publishing Co., 162 So.2d 681 (Fla.App.2, 1964). Evidently, the jury determined sub judice that the article in question would have a different effect."

Time, Inc. then argues that just because it refused to retract, this fact cannot be taken as negligence or actual malice. We agree. However, Time, Inc. argues, how could it retract that which was true. And we ask, how can Time, Inc. once again call Mrs. Firestone an adulteress at this point in time when they know: (1) that the Judge said he did not find Mrs. Firestone guilty of adultery; and (2) the Florida Supreme Court has found that the divorce was not granted on grounds of adultery.

Time, Inc. states that the trial judge did what he was not supposed to do(ie.), found Mrs. Firestone guilty of adultery and also awarded her alimony. This is ridiculous. Nowhere in the divorce decree does the judge find Mrs. Firestone guilty of adultery; the judge so testified and the Florida Supreme Court later so found. *Firestone v. Firestone* (1972) 263 So.2d 223. Even in the decision here appealed the Florida Supreme Court clearly stated:

> ". . . the truth is that the divorce was not granted on grounds of adultery and there was no express finding in the final judgment of divorce that either of the parties was guilty of marital infidelity."

Moreover, as shown under subsection (1) *supra*, Time, Inc. did not read or rely upon the wording in the divorce decree for publication of its article.

4. Time, Inc.'s argument and interpretation as to what the Florida Supreme Court's decision imposes on a pub-

lisher is distorted. The Florida Supreme Court absolutely did not hold that a publisher has to satisfy all the requirements that Time, Inc. sets forth at page 17 of its brief. Rather, the Florida Supreme Court held that *under the facts and circumstances of this case*, looking at the totality of the situation, there was sufficient evidence of negligence on Time, Inc.'s part. Time, Inc. overlooks and ignores all of its acts pointing to negligence and merely argues that the divorce decree, which it never once read, was ambiguous.

Time, Inc. lastly argues that the New York Times doctrine applies to reports of judicial proceedings as well as to public officials, public figures and matters of public or general concern. That is clearly not so, as indicated by *Gertz v. Welch*, U.S. Sup.Ct., Case No. 72-617, June 25, 1974.

5. Time, Inc. contends that even applying *Gertz, supra*, to the present case, actual malice had to be proved since Mrs. Firestone did not claim, as an element of damages, damage to reputation. It is Time, Inc.'s contention that the state interest referred to in *Gertz* is an interest in protecting reputation and that since Mrs. Firestone did not seek damages for claim to reputation, there was no state interest to protect and thus actual malice had to be proved. *Gertz* simply and plainly does not stand for that proposition. The legitimate state interest underlying the law of libel referred to in *Gertz* is "the compensation of individuals for the harm inflicted on them by defamatory falsehoods". *Gertz* p.17. This compensation, by way of a damage award, can be proved by a private individual by showing actual damages, rather than presumed damages. *Gertz* pp.25-26. As stated in *Gertz* p. 26:

> "We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehoods *include* impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (emphasis added)

In light of *Gertz*, the Florida Supreme Court stated:

> "Sub judice, the trial judge properly instructed the jury that if libel is proven by the greater weight of the evidence which caused actual damages to the plaintiff, they should award plaintiff an amount of money that will fairly and adequately compensate her for such damages, and instructed that 'It is only damages which are a direct and natural result of the alleged libel which may be recovered. If you find the plaintiff is entitled to recover damages, you may consider any shame, mortification, mental anguish, or hurt feelings experienced in the past or to be experienced in the future, if any, which you find from the evidence. There is no exact standard for fixing the compensation to be awarded on account of such damages. Any such award should be fair and just in light of the evidence.' (emphasis supplied)

The jury heard the testimony and considered the evidence before it, and the factors enumerated in the instruction of the trial judge which are the same as those set out by the Supreme Court of the United States in Gertz, supra, and upon the

> evidence decided that a just and fair award for the damages suffered by petitioner would be $100,000. This award is supported by competent evidence concerning the injury. As aforestated, the Supreme Court of the United States in Gertz, supra, recognized that there need be no evidence which assigns an actual dollar value to the injury."

CONCLUSION

This case went to the jury and it decided that Time, Inc. was guilty of libeling Mrs. Firestone. Time, Inc. now wants this court to do what the Florida Supreme Court has refused to do, and that is to hold as a matter of law that Time, Inc. had a license to publish to the nation that Mrs. Firestone was found guilty of adultery. Time, Inc.'s attitude towards this case and its "license to libel" is clearly reflected at page 20-21 of its petition where it states that it is constitutionally protected "to say what it pleases", unless the injured citizen and *victim* can prove actual malice. However, as shown, *supra*, mere negligence was the applicable standard of proof not actual malice. Time, Inc. "said what it pleased" and was found to have done so negligently. How can it now complain?

It is evident that the decision of the Florida Supreme Court is clearly in line with the libel cases handed down by this Court from *New York Times* through *Gertz*. It is submitted that the petition for writ of certiorari should be summarily denied.

Respectfully submitted,

Robert M. Montgomery, Jr., and
Edna L. Caruso, Howell, Kirby,
Montgomery, D'Aiuto and Dean
P. O. Drawer 3626
West Palm Beach, Florida 33402
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Harold R. Medina, Jr., One Chase Manhattan Plaza, New York, New York, 10005, by mail, this _____ day of _____, 1975.

By _____
ROBERT M. MONTGOMERY, JR.
and
EDNA L. CARUSO

RESPONDENT'S APPENDIX A

TIME, INC.'S ARGUMENT IN ITS BRIEF TO THE FOURTH DISTRICT COURT OF APPEAL

POINT III

IF THERE IS A CAUSE OF ACTION, PLAINTIFF'S PROOF WAS INSUFFICIENT UNDER THE DOCTRINE OF *NEW YORK TIMES V. SULLIVAN.*

Under the *New York Times* doctrine it is the plaintiff's burden to prove actual malice — that is, that defendant published with knowledge of falsity or with serious doubts as to truth. *New York Times Co. vs. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968). Ordinarily that will involve use of the defendant's employees and records. That is the very standard which this Court held applicable in the prior appeal of this case. As such, it was the law of the case to govern all further proceedings. Notwithstanding, the trial court failed to follow those requirements at the trial of this.

Moreover, even without any prior adjudications, the undisputed facts of this case clearly show that the *New York Times* doctrine was applicable. This was the report of the Final Judgment in litigation which had been initiated by the plaintiff. That litigation had received widespread and prominent press coverage throughout its stormy history, much of which consisted of direct quotes from the plaintiff. As the culmination of the litigation, the Final Judgment had been long awaited and was immediately flashed throughout the nation by the Associated Press wireservice. And, it was immediately published in the New York Daily News, a further indication of the

wide-spread public interest involved. (Def. Ex. No. 3). In addition to the fact that, as an official circuit court order, the Final Judgment was a matter of public interest, the evidence conclusively showed that the Plaintiff, as the wife of the Firestone tire heir, was a prominent public personage who was continuously in the "public eye". Unquestionably, under these circumstances the *New York Times* doctrine applies.

The *New York Times* decision involved, of course, only a "public official". However, both the Florida and Federal courts have now made it quite clear that the standards of that decision apply to any publication involving *a matter of public interest.*

The Florida decisions are *Bishop v. Wometco Enterprises Inc.*, 235 So.2d 759 (3rd DCA 1970), cert denied ..... So.2d ..... (Oct. 13, 1970, Case No. 39935) and *Gibson v. Maloney*, 231 So.2d 823 (1970).*

In *Gibson*, the *New York Times* doctrine was held applicable to:

> "fair comment" on a *public matter* relating in part to an individual who had by choice made himself newsworthy and a part of the passing scene. *Id.* at 826.

And in *Bishop*, *New York Times* was held applicable to an investigator who "testified at a public hearing before the Commission":

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* There have also been numerous reported decisions of the circuit courts of Florida holding the same. E.g., *West v. Florida Pub. Co.*, 30 Fla. Supp. 1 (C.C. Duval 1968; *Cobb v. Florida Pub. Co.*, 31 Fla. Supp. 112 (C.C. Duval 1968) and *Merritt-Chapman & Scott v. Associated Press*, 33 Fla. Supp. 102 (C.C. Dade 1970).

> Whether he was a public official, a public figure, or whether he simply involved himself in a matter of public interest, or whether his *appearance and testimony* before the Miami City Commission was a matter of public interest, it is clear that the rule in New York Times Co. v. Sullivan, supra, applies, which requires proof that the alleged libels were published with " 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or not". Until there is proof of actual malice and unless that proof has the "convincing clarity which the constitutional standard demands", it is insufficient. (Emphasis added; Citations omitted). *Id.* at 761.

The Federal decisions, all holding that where there is *public interest in the publication* the *New York Times* doctrine applies, include: *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892 (1969); *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969) cert. denied, 395 U.S. 922 (1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968) cert. denied, 394 U.S. 921 (1969) and *Sellers v. Time, Inc.*, 299 F.Supp. 582 (E. D. Pa. 1969) aff'd 423 F.2d 887 (3rd Cir. 1970). Of particular relevance to the facts of this case are the decisions in *Rosenbloom and Sellers.*

Rosenbloom was a distributor of nudist magazines. He had been raided by the police and brought an action seeking to enjoin any further raids. In holding that the *Times* standard applied, the Court noted that those reports:

dealt with the *institution and development of a legal action by plaintiff* and two publishers against an influential segment of the news media (all major local newspapers and the local CBS-TV affiliate), as well as against the City of Philadelphia, its Police Commissioner, and its district attorney to end harassment of plaintiffs in the operation of their business. Again, it is clear to us that the *subject matter was of real public interest.* Indeed, *the Supreme Court has construed broadly the concept of a matter or an issue of public interest:*

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093. Time Inc. v. Hill, 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed. 2d 456 (1967). (Emphasis added).

Sellers was a defendant in a personal injury action arising out of a golfing accident. The publication complained of, which appeared in "The Law" section of Time magazine, reported the denial of Sellers' motion for summary judgment in this case. Sellers sued for libel as a result of that publication and Time, Inc. defended on the grounds that the publication was "privileged under the common law rule of a fair report of judicial proceedings" and also on the grounds that it was protected under the *New York Times* doctrine. The District Court found that the Time publication fairly reported the result of the summary judgment proceeding and since it was a report of a judicial proceeding it was a *matter of public interest* and that it "came within the common law and constitutional privileges. . . ." It was held to be Sellers' burden to prove actual malice on the part of the defendant and on summary judgment the proof was held "as a matter of law" to be insufficient and summary judgment was entered for the defendant.

The publication here concerned a divorce in one of the most well-known families in this country. The litigation had been the subject of wide-spread coverage by the various news media. The plaintiff herself, as Rosenbloom, had instituted and developed the litigation and, as with Sellers, was a party to the litigation. The plaintiff herself, as Bishop, had testified in a public hearing. Thus it is clear that the *New York Times* doctrine applies to and governs this case.

As noted in *Bishop,* under the *New York Times* standard it is the plaintiff's burden to prove "actual malice" with convincing clarity. Actual malice consists of publication either with knowledge of falsity or "serious

doubts as to truth". *St. Amant v. Thompson*, 390 U.S. 727 (1968). Here the plaintiff's proof totally fails to meet those requirements. There was absolutely no evidence that any of defendant's employees had any knowledge of falsity or serious doubts as to truth. To the contrary they all testified that they believed at the time and still today that the publication was truthful and accurate. Indeed, as laymen, without legal training, there could be no reason for them to have any other conclusion. Since there is no evidence to meet the standards of *New York Times* which controls this case, the judgment below should be reversed with directions to enter judgment for the defendant.

RESPONDENT'S APPENDIX B

TIME, INC.'S ARGUMENT IN ITS BRIEF TO THE FLORIDA SUPREME COURT

ARGUMENT

POINT I

PLAINTIFF'S PROOF WAS INSUFFICIENT UNDER THE DOCTRINE OF *NEW YORK TIMES vs SULLIVAN*

In plaintiff's brief in support of her petition for Writ of Certiorari no complaint was made of the District Court's holding that the constitutional privilege, detailed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny, is applicable to this case. Now, in her brief on the merits, plaintiff argues that that holding is erroneous. That argument completely misconceives the law.

This action was commenced in 1968. In 1966 this same plaintiff had commenced an action, based on a publication in Life, against this same defendant. In each of these cases plaintiff predicated her claim upon common law libel grounds with the unwarranted assertion both that the Constitution of the United States is not applicable to give protection in these cases because the articles did not deal with *matters of public interest* and that, in any event, defendant did not qualify for constitutional protection because plaintiff had proved, "with convincing clarity", both falsity and knowledge of falsity or serious doubts as to truth, the latter argument in essence being simply a negligence theory.

Plaintiff's argument on *public interest* clearly van-

ished with the decision in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Indeed, when the decision of a Florida Circuit Court ceases to be of *public interest*, our courts imagine a clearer case of *public interest*.

Plaintiff, in relying upon a negligence standard, disregards that negligence is plainly not the test under the Constitution, as clearly enunciated by the Supreme Court in *New York Times v. Sullivan, Id.* at 288 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964); *Times, Inc., v. Hill*, 385 U.S. 374, 389 (1967); *St. Amant v. Thompson*, 390 U.S. 727, 731-732 (1968) and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50-51 (1971).

Plaintiff has advanced essentially the same arguments in both these actions. Both points in the Life article case were rejected by the United States Court of Appeals for the Fifth Circuit in *Firestone v. Time, Inc.*, 460 F.2d 712 (April 20, 1972). Plaintiff carefully omits to point out that certiorari in that action was denied by the Supreme Court of the United States on October 10, 1972. The District Court of Appeals below in this action has reached essentially the same conclusion as to both points.

We turn, in more detail, to the specific points involved, *i.e.*, application of constitutional protection and qualification for constitutional protection.

A. *Application of constitutional protection — public interest.*

As long the publication "concerns a *matter of public or general interest*" constitutional protection applies. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir. 1972), *cert. denied* ____ U.S. ____, Oct. 10, 1972; *Gibson v. Maloney*, 263 So.2d 632 (1st D.C.A. 1972); *Bishop v. Wometco Enterprises, Inc.*, 235 So.2d 759 (3rd D.C.A. 1970), *cert. denied* 240 So.2d 813.

Particular note should be made of the decision in *Firestone v. Times, Inc., supra.* There the district court judge made a specific finding, as did the trial judge here, that "the plaintiff's private marital difficulties' did not come within the scope of the *New York Times* doctrine. That finding was specifically reversed on the basis of *Metromedia.**

The same result must follow here. This was the report of the Final Judgment in litigation which had been initiated by the plaintiff. That fact alone qualifies for application of the *New York Times* doctrine. *Rosenbloom v. Metromedia*, 415 F.2d 892 (3rd Cir. 1969), aff'd 403 U.S. 29; *Sellers v. Time, Inc.*, 299 F.Supp. 582 (E.D. Pa. 1969), aff'd 423 F.2d 887 (3rd Cir. 1970), *cert. denied* 400 U.S. 830 (1970); *Bishop v. Wometco Enterprises, Inc., supra.* As noted in *Bishop:*

> Whether he was a public official, a public figure, or whether he simply involved himself in a mat-

* The Metromedia clarification that "public interest" was the pivotal point for application of the doctrine had in fact been apparent from the outset. E.g., *New York Times Co. v. Sullivan*, at 269; *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *United Medical Lab. v. CBS*, 404 F.2d 706 (9th Cir. 1968), *cert. denied* 394 U.S. 921 (1969); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969) *cert. denied* 395 U.S. 922; *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Time, Inc. v. Ragano*, 427 F.2d 219 (5th Cir. 1970); *Dacey v. The Florida Bar*, 427 F.2d 1292 (5th Cir. 1970); *Davis v. National Broadcasting Company*, 320 F.Supp. 1070 (E.D. La. 1970), aff. 447 F.2d 981 (5th Cir. 1971). There have also been numerous reported decisions of the circuit court of Florida holding the same. E.g., *West v. Florida Pub. Co.*, 30 Fla. Supp. 1 (C. C. Duval 1968); *Cobb v. Florida Pub. Co.*, 31 Fla. Supp. 112 (C. C. Duval 1968) and *Merritt-Chapman & Scott v. Associated Press*, 33 Fla. Supp. 102 (C.C. Dade 1970).

> ter of public interest, or whether his *appearance and testimony* before the Miami City Commission was a matter of public interest, it is clear that the rule in New York Times Co. v. Sullivan, supra, applies, which requires proof that the alleged libels were published with " 'actual malice' — that is, with knowledge that it was false or not". Until there is proof of actual malice and unless that proof has the "convincing clarity which the constitutional standard demands", it is insufficient. (Emphasis added; Citations omitted). *Id.* at 761.

If possible, the application of the *New York Times* doctrine here is even clearer for this was not just any judicial proceeding. The parties enjoyed national prominence. The case involved one of this nation's most well-known families and greatest fortunes. The testimony was "colorful" and "sensational". There was national news coverage of the progress of the case. Plaintiff, all during her married life, and even prior thereto, commanded extensive news media attention. And, during her litigation she encouraged and voluntarily joined in the media coverage. Indeed, even this Court's opinion concerning that litigation was a national news item and the subject of an Associated Press Dispatch. See, for example, Miami Herald, April 14, 1972, p. 2C, col. 1, 2, 3, and New York Times, April 15, 1972, p. 21, col. 4.

The public status of plaintiff's marital litigation thus narrows the inquiry to whether plaintiff's proof was sufficient under the *New York Times* doctrine. The answer is clearly no.